IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. .....

JAMES ZUCKERMAN and
JOHN J. OBSTARCZYK,

Petitioners,

vs.

ESTHER M. HILL and
DEWEY S. MALEK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, James Zuckerman and John J. Obstarczyk, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Montana filed on the 19th day of August, 1960. Petition for rehearing was duly filed by petitioners and was denied by the Supreme Court on October 14th, 1960 and remittitur issued on that date.

OPINIONS BELOW

The original Findings of Fact and Conclusions of Law of the District Court of Cascade County, Montana appear as appendix "A" hereto, and its amended Findings of Fact and Conclusions of Law as appendix "B." The opinion of the Supreme Court appears as appendix "C." Such opinion has not been officially reported but is reported in 355 Pac. (2d) 521.

JURISDICTION

On August 19th, 1960 the Supreme Court of Montana issued and filed its opinion affirming the Findings of Fact and Conclusions of Law of the District Court (Appendix C). Petition for rehearing was timely filed and on October 14, 1960 was denied by the Supreme Court. On that day remittitur was issued to the District Court and was filed in that Court on October 17, 1960.

Jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1257 (3).

QUESTION PRESENTED

Whether, under the facts here presented and the law applicable thereto, the petitioner was afforded due process of law under the provisions of Amendment 14 to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) Article VIII, Section 2 of the Montana Constitution provides:

"The Supreme Court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state

(b) Section 93-216, Revised Codes of Montana, 1947, provides:

"The Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. . . ."

(c) Section 93-8003, Revised Codes of Montana, 1947, provides:

"An appeal may be taken to the Supreme Court from a district court in the following cases:

"(1) From a final judgment entered in an action or special proceedings commenced in a district court, or brought into district court from another court."

(d) Section 93-4705, Revised Codes of Montana, 1947, provides:

"An action may be dismissed . . . in the following cases:

'6. By the Court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months.'"

STATEMENT

1. No final judgment has ever been entered by the District Court in this cause. Under such circumstances,

(a) The Supreme Court had no jurisdiction to consider the appeal and it should have been dismissed; and,

(b) Petitioners had the absolute right to have the action dismissed under the provisions of Section 93-4705, subd. 6, above quoted.

I.

MANNER OF RAISING THE ISSUE IN THE COURTS BELOW

In the Supreme Court of Montana, petitioners raised the question in their brief, page 57, as follows:

"A further question arises with respect to the various judgments entered. Each of the judgments . . . is as follows:

'IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the Plaintiffs have judgment against the Defendants in accordance with said Findings of Fact and Conclusions of law.'

Upon this question see:

Lewis v. Lewis, 109 Mont. 42, 50, 94 Pac. (2d) 211;

Rogers v. Rogers, 123 Mont. 52, 56, Pac. (2d) 998;

Goliger v. McNulty, 80 Mont. 339, 260 Pac. 401;

State ex rel Monteath v. Dist. Ct., 97 Mont. 530, 37 Pac. (2d) 567.

The question was again raised in the petition for rehearing (Appendix D, pp.).

II.

DISCUSSION AND ARGUMENT

The sole question here to be determined is whether the Supreme Court of Montana had jurisdiction to entertain the appeal here attempted or to render judgment upon such appeal.

(a) No judgment of a court affords due process of law if rendered without jurisdiction.

16a C. J. S. p. 835.

(b) The Supreme Court of Montana had no appellate jurisdiction until a final judgment was rendered.

In *Sheridan County Electric Co-op., Inc. v. Anholt*, 127 Mont. 71, 75, 257 Pac. (2d) 889, the court said:

"In that neither the Constitution nor the Legislature has provided or seen fit to grant the right of appeal from findings of fact and conclusions of law, an appeal therefrom does not lie, and therefore this court has no jurisdiction to entertain this premature appeal."

(c) The Supreme Court of Montana was required to dispose of this question of jurisdiction no matter how irregularly it was called to its attention.

O'Donnell v. City of Butte, 72 Mont. 449, 457, 235 Pac. 707.

(d) Neither the original Findings of Fact and Conclusions of Law nor the amended Findings of Fact and Conclusions of Law, (Appendix A and B), constitute a final judgment from which an appeal may be taken.

Oklahoma City v. McMasters, 196 U. S. 529, 49 Ed. 587;

Turnbull v. Braten, 126 Mont. 548, 254 Pac. (2d) 1085;

Rogers v. Rogers, 123 Mont. 52, 209 Pac. (2d) 998;

Lewis v. Lewis, 109 Mont. 42, 94 Pac. (2d) 211;

O'Keefe v. Routledge, 110 Mont. 138, 103 Pac. (2d) 307;

State ex rel King v. Dist. Ct., 107 Mont. 476, 86 Pac. (2d) 755;

Conway v. Fabian, 108 Mont. 287, 89 Pac. (2d) 1022;

State ex rel Monteath v. Dist. Ct., 97 Mont. 530, 37 Pac. (2d) 567;

Galiger v. McNulty, 80 Mont. 339, 260 Pac. 401;

State ex rel Reser v. Dist. Ct., 53 Mont. 235, 163 Pac. 1149;

Blaser v. Clinton Irr. Dist., 100 Mont. 459, 53 Pac. (2d) 1141.

(e) A final Judgment cannot be amended or changed.

Leonard v. Hoppins, 121 Mont. 275, 191 Pac. (2d) 990;

Merhar v. Powers, 73 Mont. 451, 236 Pac. 1075.

But the Findings of Fact and Conclusions of Law and so-called Judgment, here involved, were amended by the

court upon its own motion and without notice of any kind.

(f) The so-called Judgment which follows and refers to the Findings of Fact and Conclusions of Law is a mere order for a Judgment and nothing more.

Lewis v. Lewis, 109 Mont. 42, 94 Pac. (2d) 211;
Rogers v. Rogers, 123 Mont. 52, 209 Pac. (2d) 998;
Blaser v. Clinton Irr. Dist., 100 Mont. 459, 53 Pac. (2d) 1141.

(g) The Supreme Court of Montana never passed upon the contentions here made but merely stated that "we find no justification for disturbing the findings and conclusions of the trial court," and upon that basis affirmed a non-existent judgment. (Appendix C).

(h) The amended Findings of Fact and Conclusions of Law were filed by the Court on September 8th, 1958. (Appendix B). No judgment has ever been made or entered thereon. Under the provisions of Section 93-4705, subd. 6, the petitioners are entitled as a matter of right to have the acion dismissed. The provisions of that section are mandatory.

State ex rel Stiefel v. Dist. Ct., 37 Mont. 298, 304, 96 Pac. 337.

This right is a vested property right and may not be taken from petitioners without due process of law.

Respectfully submitted.
H. CLEVELAND HALL
Attorney for Petitioners

APPENDIX A

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE.

ESTHER M. HILL and DEWEY S. MALEK,
Plaintiffs,

vs.

JAMES ZUCKERMAN, and JOHN J. OBSTARCZYK,
Defendants.

Cause No. 41092

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above cause coming on regularly for trial on the 13th day of February, 1958, before the HONORABLE JACK R. LOUCKS, Judge of the Fifteenth Judicial District of the State of Montana, presiding without a jury, the Plaintiffs appearing in person and by their counsel, JULIUS J. WUERTHNER and JOHN P. WUERTHNER, and the Defendants appearing in person and by their counsel, H. CLEVELAND HALL, the parties having announced themselves ready for trial, and thereafter evidence being introduced on behalf of the Plaintiffs and Defendants, and the parties having rested, the Court having ordered the case submitted upon pleadings, evidence and briefs having been submitted by counsel for the respective parties, and the Court having

considered the pleadings, evidence and briefs submitted, now makes the following Findings of Fact:

Findings of Fact

I.

That the instant action is one for declaratory judgment, and the Plaintiffs are the real parties in interest; *that the Defendant JAMES ZUCKERMAN herein stated has been, and still is, the owner of those certain premises and real estate located at 222 Central Avenue, Great Falls, Montana, the true and correct description of which is as follows, to-wit:*

The East Twenty-five and Two-thirds Feet (E. 25-2/3rds ft.) of Lot numbered Six (6) in Block numbered Three Hundred Sixty-six (366), Original Townsite of Great Falls, Cascade County, Montana, according to the official map or plat thereof on file and of record in the office of the County Clerk and Recorder of Cascade County, Montana.

II.

That the Plaintiffs are the lessees of the (above-described premises) by virtue of a lease marked Exhibit "A" in the Second Amended Complaint on file herein, and which lease has been duly and regularly renewed by a certain judgment given, made and entered by the above-entitled court in Cause No. 39764, in the office of the Clerk of the above-described Court for a period of ten (10) years on the same terms and conditions as set forth in the original lease marked Exhibit "A."

III.

That the lease *on the premises known as the PENSION BAR*, located at 222 Central Avenue, Great Falls, Montana, contained *an option* to purchase said *building* in favor of the Plaintiffs. In construing the terms of said

lease the Court finds that the Defendant James Zuckerman, the owner of said premises, in violation of the Plaintiffs' *said option to purchase, fraudulently attempted to sell the same to the Defendant, JOHN J. OBSTARCZYK, and which purported sale is null and void.* That no notice was ever received *by the Plaintiffs* containing terms of the proposed sale to the Defendant John J. Obstarczyk, pursuant to said lease.

IV.

That the Plaintiffs herein have fully performed all of the terms and conditions of said lease and are entitled to exercise *said option to purchase.*

V.

That the said Plaintiffs shall be entitled to purchase the said premises on the same terms and conditions as are contained in that certain agreement dated November 29th, 1954, by and between James Zuckerman, of Great Falls, Cascade County, Montana, as Vendor, and John J. Obstarczyk, of Great Falls, Cascade County, Montana, as Vendee, and which agreement was recorded in the office of the Clerk and Recorder of Cascade County, Montana, on December 1st, 1954 at 2:50 o'clock P.M., and recorded in Book 238 of Deeds at Page 79. That the said Defendant James Zuckerman, shall furnish merchantable title to the said premises and execute an agreement with Plaintiffs containing the same terms as are found in the agreement referred to in this paragraph.

Conclusions of Law

I.

The Court concludes from the aforesaid Findings of

Fact, and from the record herein, that the Plaintiffs are entitled to recover judgment against the Defendants.

II.

That the Court has construed the lease marked Exhibit "A" in the Second Amended Complaint herein, and concludes that no proper notice *was given the Plaintiffs* of the proposed sale as provided under the terms of said lease.

III.

That the Plaintiffs have, and they are hereby declared to have, the right, privilege and authority to purchase the premises described in paragraph I of the Second Amended Complaint on file herein *on the same terms and conditions as granted the Defendant John J. Obstarczyk.*

IV.

That the alleged sale between the Defendants James Zuckerman and John J. Obstarczyk *is fraudulent and void, and of no legal force or effect.*

V.

That the Defendants shall furnish within a period of fifteen (15) days after the entry of judgment herein, in accordance with these Findings of Fact, an abstract of title to the premises described in paragraph I of said Second Amended Complaint herein.

VI.

That the Defendant James Zuckerman be required to execute a conditional sales contract in substance and identical with that entered into between him and the Defendant John J. Obstarczyk, and which contract is more particularly referred to in the Findings of Fact herein.

VII.

That the Plaintiffs have judgment against Defendants

in accordance with Findings of Fact and Conclusions of Law, and recover their costs in this action, to be taxed in accordance with the law in such cases made and provided.

VIII.

That the Defendant John J. Obstarczyk shall furnish all conveyances necessary to effectuate the judgment.

Judgment

NOW, THEREFORE, by reason of the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Plaintiffs recover judgment against the Defendants in accordance with said Findings of Fact and Conclusions of Law.

DATED this 22nd day of August, 1958.

JACK R. LOUCKS

Filed August 25, 1958.

APPENDIX B

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE.

ESTHER M. HILL and DEWEY S. MALEK,
Plaintiffs,

vs.

JAMES ZUCKERMAN, and JOHN J. OBSTARCZYK,
Defendants.

Cause No. 41092

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The above cause coming on regularly for trial on the 18th day of February, 1958, before the HONORABLE JACK R. LOUCKS, Judge of the Fifteenth Judicial District of the State of Montana, presiding without a jury, the Plaintiffs appearing in person and by their counsel, JULIUS J. WUERTHNER and JOHN P. WUERTHNER, and the Defendants appearing in person and by their counsel, H. CLEVELAND HALL, the parties having announced themselves ready for trial, and thereafter evidence being introduced on behalf of the Plaintiffs and Defendants, and the parties having rested, the Court having ordered the case submitted upon pleadings, evidence and briefs having been submitted by

counsel for the respective parties, and the Court having considered the pleadings, evidence and briefs submitted, made Findings of Fact, Conclusions of Law and Judgment, and rendered Judgment thereon on August 22nd, 1958, and Findings of Fact and Conclusions of Law and Judgment having been duly given, made and entered in the above cause in favor of the Plaintiffs and against the Defendant, and Notice of Entry of Judgment having been served on attorneys for the above-named Defendants on August 25th, 1958, and the said Findings of Fact, Conclusions of Law and Judgment having been duly filed herein in the office of the Clerk of the above-entitled Court on August 25th, 1958; *and the Defendants duly serving their Exceptions to Defective Findings* on August 29th, 1958, and the Court desiring to amend said Findings of Fact, Conclusions of Law and Judgment, the Court now makes the following amended Findings of Fact, Conclusions of Law and Judgment:

Findings of Fact

I.

That the instant action is one for declaratory judgment, and the Plaintiffs are the real parties in interest; *that here is a justifiable controversy between Plaintiffs and Defendants;* that the Defendant JAMES ZUCKERMAN herein stated has been, and still is, the owner of those certain premises and real estate located at 222 Central Avenue, Great Falls, Montana, the true and correct description of which is as follows, to-wit:

The East Twenty-five and Two-thirds Feet (E. 25 2/3rds ft.) of Lot numbered Six (6) in Block numbered Three Hundred Sixty-six (366), Original Townsite of Great Falls, Cascade County, Montana.

according to the official map or plat thereof on file and of record in the office of the County Clerk and Recorder of Cascade County, Montana.

II.

That the Plaintiffs are the lessees of the above-described premises by virtue of a lease marked Exhibit "A" in the Second Amended Complaint on file herein, and which lease has been duly and regularly renewed by a certain judgment given, made and entered by the above-entitled Court in Cause No. 39764, in the office of the Clerk of the above-described Court for a period of ten (10) years on the same terms and conditions as set forth in the original lease marked Exhibit "A."

III.

That the lease on the premises known as the PENSION BAR, located at 222 Central Avenue, Great Falls, Montana, contained *the following* option to purchase said building in favor of the Plaintiffs:

"In the event of a contemplated sale of said premises during the term of this lease, or extended term thereof, Lessor hereby agrees to give to Lessees a notice in writing, at least ten (10) days before the contemplated sale, of the substance of the terms on which said sale is proposed to be made, which notice shall be by registered mail, addressed to Lessees at the said premises; and thereupon, within ten (10) days from the date of mailing said notice, Lessees shall have the right to purchase said premises upon the terms and conditions expressed in such notice, and on the failure of Lessees to exercise such option within the time aforesaid, this option hereby granted to Lessees shall be and stand cancelled."

In construing the terms of said lease the Court finds that the Defendant James Zuckerman, the owner of said premises, in violation of the Plaintiffs' said option to purchase,

fraudulently attempted to sell the same to the Defendant, JOHN J. OBSTARCZYK, and which purported sale is null and void. That no notice of a sale or contemplated sale was ever received by the Plaintiffs, *or their predecessors in interest*, containing terms of the proposed sale to the Defendant John J. Obstarczyk, pursuant to said lease.

IV.

That the Plaintiffs herein have fully performed all of the terms and conditions of said lease and are entitled to exercise said option to purchase.

V.

That the said Plaintiffs shall be entitled to purchase the said premises on the same terms and conditions as are contained in that certain agreement dated November 29th, 1954, by and between James Zuckerman, of Great Falls, Cascade County, Montana, as Vendor, and John J. Obstarczyk, of Great Falls, Cascade County, Montana, as Vendee, and which agreement was recorded in the office of the Clerk and Recorder of Cascade County, Montana, on December 1st, 1954, at 2:50 o'clock, P.M., and recorded in Book 238 of Deeds at Page 79. That the said Defendant James Zuckerman, shall furnish merchantable title to the said premises *on or before October 1st, 1958*, and shall execute an agreement, *on or before October 1st, 1958*, with Plaintiffs containing the same terms as are found in the agreement referred to in this paragraph.

Conclusions of Law

I.

The Court concludes from the aforesaid Findings of Fact, and from the record herein, *that there is a justifiable*

controversy between the parties and that the Plaintiffs are entitled to recover judgment against the Defendants.

II.

That the Court has construed the lease marked Exhibit "A" in the Second Amended Complaint herein, and concludes that no proper notice was given the Plaintiffs of the proposed sale as provided under the terms of said lease.

III.

That the Plaintiffs have, and they are hereby declared to have, the right, privilege and authority to purchase the premises described in paragraph I of the Second Amended Complaint on file herein on the same terms and conditions as granted the Defendant John J. Obstarczyk.

IV.

That the alleged sale between the Defendants James Zuckerman and John J. Obstarczyk is fraudulent and void, and of no legal force or effect.

V.

That the Defendants shall furnish within a period of fifteen (15) days after the entry of judgment herein, in accordance with these Findings of Fact, an abstract of title to the premises described in paragraph I of said Second Amended Complaint herein.

VI.

That the Defendant James Zuckerman, *on or before October 1st, 1958*, be required to execute a conditional sales contract in substance and identical with that entered into between him and the Defendant John J. Obstarczyk, and which contract is more particularly referred to in the Findings of Fact herein.

VII.

That the Plaintiffs have judgment against Defendants

in accordance with Findings of Fact and Conclusions of Law, and recover their costs in this action, to be taxed in accordance with the law in such cases made and provided.

VIII.

That the Defendant John J. Obstarczyk shall furnish all conveyances necessary to effectuate the judgment on or before October 1st, 1958.

Judgment

NOW, THEREFORE, by reason of the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Plaintiffs recover judgment against the Defendants in accordance with said Findings of Facts and Conclusions of Law.

DATED this 5th day of September, 1958.

JACK R. LOUCKS
Presiding Judge

Filed September 8, 1958.

APPENDIX C

Mr. Justice Angstman delivered the Opinion of the Court.

This action is for a declaratory judgment. It seeks the construction of a written lease and declaration of the rights of Plaintiffs thereunder.

The facts are these: On December 6, 1948, Zuckerman was the owner of the premises involved which are located at 222 Central Avenue, Great Falls, and on which is located what is called the Pension Bar. On that day he entered into a written lease whereby he leased the premises to William H. Earl and James M. Carlisle for a term of five years with the privilege of renewal for an additional ten years on the same terms and conditions.

On June 15, 1949, Carlisle quitclaimed and assigned all of his rights to William H. Earl with the approval of Zuckerman.

That as a result of judicial proceedings in the district court of Cascade County, a judgment was entered by which it was decreed that the lease made on December 6, 1948, had been renewed for an additional ten year period. In the meantime, Andrew A. Balko and George A. Bartnick had purchased the Pension Bar under a conditional sales contract and an assignment of the lease by William H. Earl, which was held in escrow until payment of the full purchase price. Balko and Bartnick were parties to the action resulting in the renewal of the lease for an additional ten years. On November 17, 1954, Balko and Bartnick paid the balance due on the purchase price and became the owners of the lease and the Pension Bar. On that day they sold and assigned all their interest in the lease and in the Pension Bar to the Plaintiffs herein

who entered into possession of the bar and the premises involved. The assignment was duly recorded with the County Clerk and Recorder of Cascade County.

The lease to Earl and Carlisle contained this clause:

"In the event of a contemplated sale of said premises during the term of this lease, or extended term thereof, Lessor hereby agrees to give to Lessees a notice in writing, at last ten (10) days before the contemplated sale, of the substance of the terms on which said sale is proposed to be made, which notice shall be by registered mail, addressed to Lessees at the said premises; and thereupon, within ten (10) days from the date of mailing said notice, Lessees shall have the right to purchase said premises upon the terms and conditions expressed in such notice, and on the failure of Lessees to exercise such option within the time aforesaid this option hereby granted to Lessees shall be and stand cancelled:".

The complaint, as finally amended, alleges that at no time did defendant Zuckerman or any agent or employee give to Plaintiffs, or their predecessors in interest, written notice of intention to sell as required by the lease. It alleges that on November 29, 1954, in violation of the lease, Defendant Zuckerman attempted to sell the property involved to Defendant Obstarczyk by an instrument duly acknowledged and recorded. It alleges that the attempted sale was and is fraudulent and fictitious; that neither Plaintiff, nor their predecessors in interest, *received notice by registered mail* of their right to exercise the option to purchase; that they are ready, willing and able to purchase the premises on the terms on which the alleged sale was made to Defendant Obstarczyk.

The court found that the attempted sale to Obstarczyk

was and is null and void; *that no notice was received by Plaintiffs containing terms of the proposed sale to Obstarczyk as provided* in the lease. It found that Plaintiffs are entitled to purchase the premises on the same terms and conditions as set forth in the agreement between Zuckerman and Obstarczyk. It found specifically that the alleged sale to Obstarczyk was fraudulent and void.

Defendants have appealed from the judgment in favor of Plaintiffs.

The determinative point in the case is whether notice was given Plaintiffs or their predecessors in interest as provided in the contract so as to enable them to exercise the right and option to purchase. Or more specifically stated, did the trial court err in finding that no notice was given?

If there be in the record substantial evidence supporting that finding, we will not disturb the ruling even though the evidence be conflicting.

The evidence bearing on this point consisted of the following: Mr. Zuckerman was called by Plaintiffs as an adverse witness. A letter and envelope were then admitted in evidence.

The envelope reads as follows:

Law Office of.
HALL, ALEXANDER & BURTON
Strain Building
Great Falls, Montana

(Cancelled postage in amount of $.40)

SX
7-1-54/
—5

RETURNED
TO
WRITER.

FOUND IN ORDINARY MAIL

Reason Checked
Unclaimed X

RETURN RECEIPT REQUESTED

Second Notice
Jul 7, 1954
Great Falls, Mont.

MR. WILLIAM H. EARL
204 THIRD AVENUE NO.
GREAT FALLS, Montana
222 Central Ave.

REGISTERED MAIL—R.R.R.
FOUND IN ORDINARY MAIL

REGISTERED
No. 16893

The letter itself reads as follows:

"Mr. William H. Earl
Great Falls, Montana

"Dear Sir:

Without prejudice to the rights of either party in the action now pending in the District Court of Cascade County, wherein you, together with Andrew A. Balko and George A. Bartnich [sic] are plaintiffs and the undersigned is defendant, you are hereby advised as follows:

"The undersigned contemplates selling the building known as and described as No. 222 Central Avenue, Great Falls, Montana, a portion of which building is now

occupied by Balko and Bartnich [sic] under some arrangement with you. The sale price is $50,000.00, to be paid as follows: $5,000.00 upon execution of contract for deed; the balance at the rate of $205.00 per month. Vendor will reserve living quarters upstairs in said building for the duration of his life, and shall have the right, during the term of the contract, to inspect the building for the purpose of ascertaining whether the same is being kept in repair. Vendor will pay one-half (½) the taxes and assessments for the year 1954. Vendee will pay one-half (½) the taxes for 1954 and all taxes and assessments thereafter levied upon the property. Building and all fixtures therein to be kept in good state of repair during term of contract. Deed to be placed in escrow and delivered upon full performance of the contract.

"You are hereby given ten (10) days from and after June 30th, 1954, in which to purchase the above-described property upon the terms above set forth.

"Yours very truly,
"*James Zuckerman /s/*
James Zuckerman"

HCH:mg

Mr. Zuckerman said that the reason why he sent the letter to the home address of Mr. Earl rather than to the Pension Bar is because "He didn't have the bar then."

Mr. S. M. Swanberg, attorney for Mr. Earl, testified that neither he nor Mr. Earl ever received a notice; that if Earl *had received such a notice* he would have shown it to the witness.

Mr. Zuckerman testified that Earl never got the letter; that he "wouldn't accept it." When asked as to why

opened the letter when it was returned he said: "My attorney opened it."

The notice shows that Balko and Bartnick were both interested in the lease yet the notice was addressed merely to Earl.

Earl testified that he resided at 204 Third Avenue North in the winter and on a farm near Chester, Montana, in the summer. He said he never before the trial saw the letter or the envelope. At the time the letter was sent he was at the ranch south of Chester. Balko and Bartnick were then operating the bar; *that he never received a notice* with reference to his option to purchase the property.

He never refused to claim the letter because he was not at the given address when it was supposed to have been delivered. The address on the envelope of 222 Central Avenue was written with a pencil.

Balko testified that he never received any notice of any kind and that no notice had been sent to Earl by registered letter and left at the Pension Bar. That it was common knowledge around the bar that Earl lived at Chester during the summer and that if any letter came to him at the bar it would be delivered to him.

The postmaster at Great Falls testified that when a registered letter is checked out by the carrier and not delivered, it is returned to the registry section; that the carrier leaves a notice at the address of the addressee that the mail can be picked up at the post office; that if the first notice fails to bring results a second notice is *mailed to the same address or the last known address of the party to whom the letter is addressed.* If the second notice goes unheeded the mail is returned to the sender.

Asked whether the carrier puts on a different address he said, "No. Unless they have an official notice made out by the patron, they have no right to assume that this man has moved, or to assume that he is at another address."

These and other circumstances in the record tend to support the finding of the trial court *that no notice was received by Plaintiffs or their predecessors in interest of their option to purchase as provided in the lease and that the attempted sale to Obstarczyk therefore was null and void.* There being ample credible evidence sustaining the trial court's findings, we are not at liberty to interfere with them even though there may be some evidence to the contrary.

Defendants contend that the complaint does not state facts sufficient to constitute a cause of action. They contend that by continuing to pay rent after the attempted sale to Obstarczyk, Plaintiffs waived the right to purchase and are estopped to claim that right.

Defendants rely on a letter written by Plaintiffs to Mr. Zuckerman after the attempted sale to Obstarczyk, in which they stated:

"We shall continue to observe the terms of the lease and shall continue to pay the rental as prescribed therein at the First National Bank, the same as we have done since taking possession of the premises under the lease in question."

We see no merit in this contention. Plaintiffs *waived no rights by continuing the payment of rent so as to prevent default rendering the lease subject to termination.*

It is also contended that Plaintiffs are not the real parties in interest because they made a sublease and sale

of the Pension Bar to Kenneth and Helen Palagi on January 18, 1958, and that no justiciable controversy exists between the parties to this action. It is true that a sublease was given by Plaintiffs to Kenneth and Helen Palagi, but on January 31, 1958, they entered into a contract wherein they made it clear that Plaintiffs retained the right of purchase and hence, are the real parties in interest. That contract contains this clause: " * * * that the option to purchase under the said terms of said lease marked Exhibit 'A' was not to be granted to the said Kenneth Palagi and Helen Palagi; and that the said Esther M. Hill and Dewey S. Malek were to retain, and do still retain, the option to purchase the said described premises, at 222 Central Avenue, Great Falls, Montana." *Hence, Plaintiffs are the real parties in interest so far as the right to exercise the option to purchase is concerned and a justiciable controversy exists between the parties to this action.*"

Some contention is made that the option to purchase did not extend to the entire building, but only to the Pension Bar. We do not agree with this contention. *The lease was not limited to the Pension Bar.*

The lease contains this clause: "Lessee is hereby given the *first right to rent the space now occupied by the* Big 6 Barber Shop which is located in the same building as the premises hereinabove described." Inclusion of the provision regarding the right to lease the barber shop, *as well as other circumstances, indicates that the lease was intended to cover the entire building, including the second floor apartment occupied by Defendant Zuckerman.*

Other contentions made by Defendants have been given

consideration, but we find no justification for disturbing the findings and conclusion of the trial court.

The judgment is affirmed.

ALBERT H. ANGSTMAN
Associate Justice

We concur:
JAMES T. HARRISON
Chief Justice
HUGH ADAIR
WESLEY CASTLES
Associate Justices

APPENDIX D

NO. 10011

IN THE SUPREME COURT OF THE STATE OF MONTANA.

ESTHER M. HILL and DEWEY S. MALEK,
Plaintiffs and Respondents.

vs.

JAMES ZUCKERMAN, and JOHN J. OBSTARCZYK,
Defendants and Appellants.

APPELLANTS' PETITION FOR REHEARING

In his opinion Justice Angstman correctly states the purpose of the action involved herein as follows:

> This action is for a declaratory judgment. It seeks the construction of a written lease and declaration of the rights of Plaintiffs thereunder.

In this Petition for Rehearing we propose to again present matters which, though raised in Appellants' Brief and oral argument, have been either overlooked or absolutely ignored by the Court.

1. THE JUDGMENT

The only judgment rendered in this case is as follows:

"NOW, THEREFORE, by reason of the foregoing Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the Palintiffs recover judgment against the Defendants in accordance with said Findings of Fact and Conclusions of Law."

Is this a "judgment" under the Law of Montana, or is it merely an order for a judgment? Justice Angstman's Opinion fails to answer this question. It merely assumes that there is a judgment and upon that assumption affirms.

Section 93-4701, R.C.M. 1947 provides:

"A judgment is the final determination of the rights of the parties in an action or proceeding."

There is no principle of law more firmly established than that the Judgment *must follow and conform to the . . . findings in all substantial particulars.*

National Surety Corp. v. Kruse, 121 Mont. 202, 206, 192 Pac. (2d) 317;

Morse v. Morse, 116 Mont. 504, 508, 154 Pac. (2d) 982;

Butte Elec. Co. v. Matheres, 34 Mont. 487, 87 Pac. 460.

Findings of Fact and Conclusions of Law do not constitute a judgment, but are merely the foundation therefor.

Sheridan County Co-op v. Inhalt, 127 Mont. 71, 75, 257 Pac. (2d) 889;

Turnbull v. Brown, 126 Mont. 548, 254 Pac. (2d) 1085;

Rogers v. Rogers, 123 Mont. 52, 56, 209 Pac. (2d) 998;

O'Keefe v. Routledge, 110 Mont. 138, 148, 103 Pac. (2d) 307;

Lewis v. Lewis, 109 Mont. 42, 50, 94 Pac. (2d) 211;

State ex rel King v. Dist. Ct., 107 Mont. 476, 480, 86 Pac. (2d) 755;

Conway v. Fabian, 108 Mont. 287, 303, 89 Pac. (2d) 1022;

State ex rel Montcath v. Dist. Ct., 97 Mont. 530, 535, 37 Pac. (2d) 567;

Galiger v. McNulty, 80 Mont. 339, 352, 260 Pac. 401;

State ex rel Reser v. Dist. Ct., 53 Mont. 235, 163 Pac. 1149;

49 C. J. S. 28;

33 C. J. 1053.

Findings not embodied in the Decree may not be considered on appeal.

Lewis v. Lewis, 109 Mont. 42, 50, 94 Pac. (2d) 211;

Rogers v. Rogers, 123 Mont. 52, 56, 209 Pac. (2d) 998.

An order for judgment is not a judgment.

Brothers v. Superior Court, (Cal.) 238 Pac. 357, 358;

Turnbull v. Brown, 126 Mont. 548, 551, 254 Pac (2d) 1085;

because the Court, up to the actual entry of Judgment, may change and modify its Findings and Conclusions.

Electric Co-op v. Inhalt, 127 Mont. 71, 75, 257 Pac. (2d) 889.

Findings of Fact are not the Judgment but merely the foundation for the Judgment and therefore, in order to determine what has been adjudicated we must look to the mandatory portion of a judgment or decree and not to the recitals.

Blaser v. Clinton Irr. Dist., 100 Mont. 459, 464, 53 Pac. (2d) 1141;

Galiger v. McNulty, 80 Mont. 339, 351, 260 Pac. 401

Again, we point out that the so-called judgment merely provides that:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the Plaintiffs recover Judgment against the Defendants in accordance with said Findings of Fact and Conclusions of Law."

Under the above decisions the above is not a judgment at all, but at most an order for a judgment. It has no mandatory portion and adjudges nothing.

Under such circumstances it cannot be affirmed by this Court nor does this Court have jurisdiction to do anything with it.

Turnbull v. Brown, 126 Mont. 548, 550, 254 Pac. (2d) 1085;

Sheridan Co. Elec. Co-op v. Anhalt, 127 Mont. 71, 75, 257 Pac. (2d) 889.

Before a Court may compel specific performance by a party there must be a valid judgment requiring him to perform. Before this Court can affirm a Judgment there must be one in existence. Without a Judgment there is no due process of law for this Court is without jurisdiction.

16 A. C. J. S. Sec. 625, pp. 835.

It is respectfully submitted that this Court should pass upon the above question before it enters upon a discussion of the appeal on the merits. This Court, as we have seen in the above cited decisions, has not hesitated to do so upon its own inspection of the record. Here the matter has been directly presented to the Court. If the previous decisions of this Court, above cited, are to be overruled this should be done. If this case can be distinguished from the long line of decisions cited this should be done.

2. SPECIFIC PERFORMANCE

In this portion of our petition we shall assume, for the purpose of argument, that a Judgment has been entered

in the lower court which may, under the law, be presented to this Court for its consideration.

As Justice Angstman pointed out, the action here is for a declaratory Judgment, seeking the construction of a written lease and declaration of the rights of Plaintiffs thereunder. Such is the pleading upon which Plaintiffs came into Court. Thus the prayer of the complaint is that the Court construe "the said written lease, marked Exhibit 'A,' and also the said alleged contract entered into between the Defendants, Zuckerman and Obstarczyk, and that the Judgment define the rights, status and legal relations of the Plaintiffs, under their said lease and the said alleged contract for deed, and that *if Notice is given* under the terms of said lease, Exihibit 'A,' as provided therein that the Plaintiffs may have the right, privilege and authority to purchase and buy the premises described in paragraph I herein," etc.

However, we came out of the case with findings based upon an entirely different theory and a greatly enlarged species of relief.

See:

Angstman, Justice in the case of *Joy v. Little*, (Mont.) 328 Pac. (2d) 636, 641.

The Court made Findings as follows, (r. pp. 270-272):

1. Zuckerman is the owner of the building here involved.
2. Plaintiffs have a lease on the building.
3. Plaintiffs as tenants under such lease have an option [sic] to purchase the building after notice of a contemplated sale is given.
4. There has been no sale of the building.
5. That no notice of a contemplated sale was ever received by Plaintiffs or their predecessors in interest.

6. That Plaintiffs are entitled to purchase the building on the same terms as are contained in the void agreement between Zuckerman and Obstarczyk and that Zuckerman shall execute an agreement with Plaintiffs containing the same terms as are found in the void Obstarczyk agreement.

The Conclusions of Law follow generally the Findings of Fact, (r. pp. 272, 273), and concludes that:

1. The sale by Zuckerman to Obstarczyk is void and of no legal force or effect.
2. The Plaintiffs were given no Notice of a proposed sale by Zuckerman to Obstarczyk.
3. The Plaintiffs have a right to purchase the building.
4. That Zuckerman "be required to execute a conditional sales contract in substance and identical with that entered into between him and the Defendant Obstarczyk."

Thus we came in with a prayer for declaratory relief and came out with specific performance against the Defendant Zuckerman. There is nothing in the Findings of Fact or Conclusions of Law compelling the Plaintiffs to do anything. Upon the basis of this situation we desire to present to the Court argument upon the matter of specific performance.

1. The Decree must require performance by the Plaintiffs.

We have under consideration here a contract which, among other things, requires that the Vendee thereunder pay the sum of $5,000.00 in cash at the time of the execution of the contract. (R. p. 18). But the Findings and Conclusions are silent as to this requirement.

It is generally held that the Decree requiring specific performance by the Defendant must likewise require full performance by the Plaintiff.

The Decree must bind all the parties, for a Decree of specific performance is erroneous unless it requires of the Plaintiff the performance of his share of the obligations.

Freeburgh v. Lamoureux, (Wyo.) 85 Pac. 1054, 1055;

Olympia Mining Co. v. Kerns, (Idaho) 91 Pac. 92;

Gadsby v. Gadsby, (Mass.) 175 N.E. 495;

London v. Joslovitch, 110 N.Y.S. (2d) 58;

Casey v. Jones, (Tex.) 189 S.W. (2d) 515;

81 C. J. S. p. 791.

This requirement would seem to be covered by section 17-803, R.C.M. 1947, which provides:

"Neither party to any obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation. . . ."

McDonald v. Stewart, 127 Mont. 188, 199, 259 Pac. (2d) 799;

Brubaker v. D'Orazi, 120 Mont. 22, 34, 179 Pac. (2d) 538.

The Decree, if there is one, is clearly erroneous in failing to require the Plaintiffs, as well as the Defendant Zuckerman, to perform and must be reversed.

2. May the Plaintiffs be compelled to perform?

As we have seen, under Section 17-803, R.C.M., 1947, the remedy of specific performance must be mutual. The question here is whether there is such mutuality under the facts here presented.

Under the provisions of the lease the Plaintiffs had the "first right to purchase" when and if a sale of the premises was contemplated, and Notice thereof given to the Plaintiffs. This "first right to purchase was not an option"

because the Plaintiffs had no rights until the Defendant Zuckerman decided to sell the premises.

51 C. J. S. p. 632;

Chournos v. Evona Inv. Co., (Utah) 93 Pac. (2d) 450, 452.

Upon notice of a contemplated sale, or, as the decision of this Court appears to hold, upon a void sale to a third person, the Plaintiffs then have an option to purchase the premises. Even then they were not bound to exercise the option to purchase and could not be compelled by the Defendant, Zuckerman, to do so.

It is only when the optionee has exercised the option in accordance with its terms and has performed or tendered performance of the terms of the option that specific-performance may be granted.

Ryan v. Bloom, 120 Mont. 443, 186 Pac. (2d) 879;

Steen v. Rustad, (Mont.) 313 Pac. (2d) 1014;

McLaren Gold Mines v. Morton, 124 Mont. 382, 224 Pac. 975;

66 C. J. p. 497;

91 C. J. S. p. 852.

The question arises whether the Plaintiffs have ever exercised their option, or exercised it prior to bringing the action here involved.

The lease provision is as follows, (R. p. 14):

"Within Ten (10) days from the date of mailing said Notice, Lessees shall have the right to purchase said premises upon the terms and conditions expressed in such notice."

Since the Court holds that no notice was ever given, it would seem that we should look to the contract of sale to determine how the option should be exercised.

The contract, (R. p. 18), provides for a cash payment

of $5,000.00 and that the balance of the purchase price shall be paid in monthly payments of $205.00.

The Plaintiffs were notified of the sale of the building to Obstarczyk on December 7th, 1954. (R. pp. 22, 9). On January 29th, 1955, some 53 days later the Plaintiffs wrote Zuckerman as follows, (R. p. 103):

"We are prepared and are ready, willing and able to purchase the premises under the same terms given to Obstarczyk, namely: $50,000.00 total consideration with a $5,000.00 down payment and $205.00 per month from January 1st, 1955, and which contract for sale is recorded in the office of the County Clerk and Recorder of Cascade County, Montana, and found in Book 238 of Deeds on Page 74.".

"We shall continue to observe the terms of the lease and shall continue to pay the rental as prescribed therein at the First National Bank, the same as we have done since taking possession of the premises under the lease in question."

In this connection it is interesting to note the testimony of the Plaintiffs. Malek testified, (R. pp. 99-101):

Q. "During that month (November, 1954) were you in a position to purchase that building?"

A. "Yes."

Q. "And could you, at that time, purchase it on the terms which Mr. Obstarczyk purchased it?"

A. "Yes, we could."

Q. "And were you willing to do so at that time?"

A. "That is right."

Q. "Did you have the opportunity?"

A. "No, we never did."

Q. "Have you had the opportunity since then?"

A. "No."

Q. "Are you willing and able, at the present time, to purchase that building on the same terms as Mr. Obstarczyk purported to purchase it?"

A. "Yes."

Malek further testified on cross examination, (R. p. 120):

Q. "You did not at any time prepare or have prepared a contract for the purchase of the property similar, or identical with the contract given to Mr. Obstarczyk, did you?"

A. "No, I don't believe so."

Q. "You didn't present any such contract in any such event to Mr. Zuckerman, did you?"

A. "No, we never."

Q. "Did you tender him the sum of $5,000.00?"

A. "No, we didn't."

Q. "Did you make any payments of $205.00 a month?"

A. "No, we just kept paying our rent."

Q. "You just kept paying your rent?"

A. "Uh, huh."

Q. "You considered yourself a tenant did you not?"

A. "That is right."

Q. And you continued feeling that your were a tenant until January 18th, 1958, did you not?"

A. "That is right."

Q. "When you executed this so-called sublease to Mr. and Mrs. Palagi?"

A. "That is right."

Hill testified, (R. p. 210):

Q. "Have you ever discussed the purchase of the Pension Bar with anyone?"

A. "Well I talked it over with Mr. Malek, that if we did have a chance to buy it, and it was reasonable to take over, we would have taken it."

Q. "You never had that chance?"

A. "No, sir."

On cross examination he testified as follows, (R. pp. 216, 217):

Q. "Have you ever offered to pay to Mr. Zuckerman or Mr. Obstarczyk the $5,000.00 on the down payment?"

A. "No."

Q. "Have you ever offered to pay him, that is, pay Mr. Obstarczyk or Mr. Zuckerman, any monthly payments?"

A. "No."

Q. "On the purchase of the property?"

A. "No."

Q. "When did you first know the property had been sold?"

A. "When we received this letter from Mr. Obstarczyk."

Q. "That is the letter of December 3, 1954?"

A. "Yes, sir."

Q. "And did you ascertain, thereafter, the terms upon which the property had been sold?"

A. "Well, we talked to Mr. Wuerthner, and he advised us what to do and we left it up to him."

Q. "I don't hear you, Mr. Hill. I am sorry."

A. "We talked to Mr. Wuerthner on the letter of Mr. Obstarczyk's, and he said he would check into it for us and let us know."

Q. "And, thereafter, did he advise you as to the terms upon which the property had been sold?"

A. "Yes, sir."

Q. "And about when was it that you learned about that?"

A. "Well, it was the first part of January, '55."

Q. "'55?"

A. "Right."

Q. "And at all times since January of 1955 the partner

ship of Malek and Hill have been paying rent to Mr. Zuckerman?"

A. "Yes, sir."

Q. "And that was through, down to and including the month of January, 1958, was it not?"

A. "Yes, sir."

Q. "Every month?"

A. "Every month, sir."

Q. "You considered yourself to be a tenant of Mr. Zuckerman, is that right?"

A. "Well, I was managing for the wife. The wife was . . . ."

Q. "Well, you considered the firm of Malek and Hill to be tenants of Mr. Zuckerman?"

A. "Yes, sir."

It seems very clear that the Plaintiffs have never exercised their option to purchase the premises.

This Court, in accordance with the universal rule, has held that an option for sale of land when *accepted within the time and in the manner provided,* becomes a valid contract upon which specific performance may be had.

State ex rel Board v. Bruce, 106 Mont. 322, 77 Pac. (2d) 403;

Torelle v. Templeman, 94 Mont. 149, 21 Pac. (2d) 60;

91 C. J. S. p. 852.

The contract between Zuckerman and Obstarczyk fixed the method of acceptance by the Plaintiffs. This contract required the payment of $5,000.00 in cash or at least a legal tender of that amount. Before the option could be accepted and Zuckerman placed in default so as to permit an action for specific performance this sum of $5,000.00 must have been paid or tendered. The mere statement in

a letter to Mr. Zuckerman sent some 53 days, after knowledge of the sale to Obstarczyk, that Plaintiffs "are prepared and are ready, willing and able to purchase the premises under the same terms given to Obstarczyk namely: $50,000.00 total consideration with a $5,000.00 down payment and $205.00 per month from January 1st, 1955" is not an exercise of the option.

Seeburg v. El Royals Corp. (Cal.) 128 Pac. (2d) 362;

Callisch v. Farnham, (Cal.) 188 Pac. (2d) 775, 777;

Downer v. Buehrle, (Cal.) 203 Pac. (2d) 795, 796;

Aspinwall v. Ryan, (Ore.) 226 Pac. (2d) 814, 818;

Oberan v. Western Mach. Co., (Ariz.) 174 Pac. (2d) 745, 748;

91 C. J. S. p. 856;

Whitworth v. Enitai Lbr. Co., (Wash.) 220 Pac. (2d) 328.

In the case of *Callisch v. Farnham*, (Cal.) 188 Pac. (2d) 775, 777, the court said:

"On the other hand, if it were intended, and we conclude it was, that the option would have to ripen into a binding contract of sale and purchase prior to the expiration of the period ending January 18th, then, obviously the Appellant would have to 'exercise' his right within that time. And, concurrent with that exercise is the obligation to pay the sum of $6,000.00. In *Bourdieu v. Baker*, 6 Cal. App. 2d 150, 44 P2d 587, under facts and circumstances not wholly unlike those presented herein, it was held that the burden was upon the optionee to show strict compliance with the terms of the option agreement—including payment or tender of the amount specified within the time stated. It necessarily follows from the rule as stated that the letter of January 14th wherein Appellant merely informed Plaintiff he had 'elected to go through with and complete' their deal, without the tender of the $6,000.00

did not constitute strict compliance with and therefore was not due exercise of the option by Appellant."

The whole attitude of the Plaintiffs can only lead one to conclude that they did not, on January 24th, 1955, intend to exercise any option. They made no tender of money as required, but rather, until notice of the sale and its terms were given by Zuckerman, were content to remain as tenants and to pay the rental as prescribed by the lease. (R. p. 25). The amended complaint certainly bears this theory out. In paragraph XVI it is alleged that no notice has been given of the proposed sale. In paragraph XV it is alleged that the sale to Obstarcyk is fraudulent and fictitious.

In paragraph XVIII it is alleged that:

"The Plaintiffs still have the right and option to purchase said described premises *within the period expressed by any such notice under the lease*. . . ."

In the prayer, (R. p. 11), it is said:

"*That if notice is given* under the terms of the lease, Exhibit 'A,' as prescribed therein, that the Plaintiffs may have the right, privilege and authority to purchase and buy the premises described in paragraph I herein. . . ."

"Once the option was exercised the lease no longer existed."

State v. Agostini, (Cal.) 294 Pac. (2d) 769, 774.

But the Plaintiffs down to the trial took the position that the lease was still in full force and effect.

(a) They refused to recognize the sale to Obstarczyk claiming that it was void. (R. pp. 8, 24, 119).

(b) They insist that the lease is still in force and effect.

(c) They still continued to pay rental under the lease down to the time of trial. (R. pp. 25, 117-120).

Can it be said that the acts of the Plaintiff were the

acts of persons who, on January 29th, 1955, believed that they were exercising an option to purchase the premises? We do not think so.

CONCLUSION

The above questions have never been even touched upon by the Court in its opinion. We believe it to be our right to have such questions decided. We submit that if they are passed upon and decided the Appeal must be either dismissed or the Findings and Conclusions of the lower Court reversed. We cannot believe that justice is served by the ignoring of questions decisive of an Appeal. We do believe that the absolute ignoring of such question is a failure of due process of law.

Section 93-216, R.C.M., 1947, provides:

"In equity cases, and in matters and proceedings of an equitable nature, the Supreme Court shall review all questions of fact arising upon the evidence presented in the record. . . . and determine the same, as well as questions of law. . . ."

Respectfully submitted,

HALL, ALEXANDER & KUENNING

By:.....

Attorneys for Appellants.

Service admitted this.....day of September, 1960.

WUERTHNER & WUERTHNER

By:.....

Attorneys for Respondents.